

Explanations for the Attorney General's Proposed Revisions to
the Open Meeting Law Regulations, 940 CMR 29.00-29.10

June 21, 2017

The Attorney General has proposed revisions to the Open Meeting Law regulations in an effort to help members of public bodies and the public better understand the requirements of the Open Meeting Law and to update the regulations to conform with guidance issued by the Attorney General. Below is a summary of the material revisions proposed in each section of the regulations and an explanation of why the proposed revisions are being offered. The Attorney General appreciates any public comment on these proposed revisions.

29.01: Purpose, Scope and Other General Provisions

There are no proposed revisions to this section.

29.02: Definitions

A proposed revision to this section would remove the definition of the Open Meeting Law Advisory Commission because the Commission is not otherwise referenced in these regulations, making this definition unnecessary. This section would also add definitions for regional and county public bodies to clarify their jurisdiction. State and local public body jurisdictions are generally understood and thus are not defined here.

In the definition of intentional violation, a proposed revision would remove a phrase that offers a defense to the imposition of an intentional violation where a public body reasonably relied on the advice of counsel. Language describing a defense to the imposition of a fine where a public body reasonably relied on the advice of counsel would appear in section 29.07, the section describing penalties.

29.03: Notice Posting Requirements

A significant proposed revision in this section would remove the various alternative notice posting options for local public bodies and offer a single alternative to the bulletin board: a website. Few, if any, municipalities have adopted alternatives other than the municipal website. Thus, the change should not have much impact. Another significant revision would clarify that the chief executive officer of a municipality must make the decision to adopt an alternative notice posting method for the municipality. The Attorney General has received numerous requests from municipalities seeking guidance as to who has the authority to adopt alternative notice posting methods. This proposed language clarifies that authority.

The Attorney General often receives questions about the effect on meeting notices when a website becomes unavailable for public bodies that have adopted a website for posting notices. Proposed language here offers a balanced approach to give a public body or a municipality a

short window of time to restore website access before requiring public bodies to cancel their meetings and post new notices.

Additional proposed language would require the date and time that notices are amended to be recorded on or with the notice, which conforms with guidance provided in the Attorney General's Open Meeting Law determinations.

29.04: Certification

Most of the proposed revisions here reorganize the section to make it easier to follow. A significant proposed revision requires that new public body members receive a copy of each determination by the Attorney General that the public body violated the Open Meeting Law, over the prior three years. This requirement will ensure that new public body members are aware of their public body's history of compliance with the law and any orders that the Attorney General may have issued, thus reducing the risk of repeat violations and intentional violations. Additional proposed language offers guidance in response to questions the Attorney General regularly receives regarding certification.

29.05: Complaints

There are several significant proposed revisions to this section. One proposed revision would require complainants to file their complaints only with the chair of the local public body, removing the requirement that they also file with the municipal clerk. Complaints are sometimes filed in the wrong place, causing delay or prejudice to involved parties. This proposed revision should make the filing process more straightforward and reduce the burden on the municipal clerk.

Another significant proposed revision would create an option for public bodies to request mediation with a complainant who has filed five or more complaints within the prior 12 months. This option is for public bodies that respond to frequent complaints from the same complainants and may assist in resolving ongoing conflicts. If the public body requests mediation and the complainant fails to participate, then the Attorney General may decline to review the complaint. Another proposed revision would clarify that public bodies must meet to review Open Meeting Law complaints. This requirement has been made clear in the Attorney General's determinations. Also, proposed in this section is a clarification that complainants must file complaints with the Attorney General within 90 days of an alleged violation or reasonable discovery of the alleged violation. Currently, the regulations do not account for reasonable discovery. Finally, the proposed changes remove language and subsections that are not relevant, or are rarely, if ever, invoked.

29.06: Investigation

A proposed revision in this section would clarify that, while the Attorney General will generally not disclose information provided by the subject of a complaint in the course of an investigation, the Attorney General may reveal such information in a written determination where necessary to resolve the complaint. The Attorney General will continue to maintain the confidentiality of

executive session minutes and documents where the public body has not yet publicly released the executive session minutes.

29.07: Resolution

The most significant proposed revision in this section would remove the requirement that the Attorney General resolve complaints after a hearing before issuing orders of nullification and reinstatement of an employee. This would mean that the Attorney General may order nullification of an action taken by a public body in violation of the Open Meeting Law, or order the reinstatement of an employee, without the necessity of a hearing before an administrative law judge. This would allow the Attorney General to issue such orders sooner, avoiding harm to those who rely on a public body's action that would otherwise be nullified many months later. A public body would still have the right to appeal the Attorney General's order within 21 days.

Another proposed revision clarifies that, while the Attorney General may fine a public body for an intentional violation of the Open Meeting Law, a fine will not be imposed where the public body acted in good faith compliance with advice of counsel. This is a requirement in the Open Meeting Law itself. This language would move this section from its current place in the definitions section of the regulations.

A significant proposed revision to this section would require public bodies that receive an order from the Attorney General to certify in writing to the Attorney General its compliance with the order within 30 days. Typical orders requiring written certification would include approval and release of meeting minutes and attendance at a training. No such certification would be required for orders of immediate and future compliance. This requirement would help the Attorney General ensure that public bodies comply with her orders. Proposed language would also clarify that the Attorney General does not resolve complaints by telephone.

29.08: Advisory Opinions

The Attorney General has never invoked this section, and by policy, does not issue Open Meeting Law advisory opinions. Rather, the Attorney General provides written guidance on common concerns available on the Frequently Asked Questions pages at the Attorney General's website. The proposed update to this section reflects that practice.

29.09: Other Enforcement Actions

There are no proposed revisions to this section.

29.10: Remote Participation

The most significant proposed revision to this section would replace the five permissible reasons for remote participation with the sole requirement that, to participate in a meeting remotely, physical attendance at the meeting be unreasonably difficult. This single standard should help public body members and the public understand when it is appropriate to participate remotely. The five permissible reasons currently provided in the regulations add another level of

administration to remote participation procedures. Another proposed revision would reflect a recently adopted amendment to the Open Meeting Law that applies to local commissions on disability.

29.11: Meeting Minutes

This proposed revision adds a new section describing public bodies' obligations to approve both open and executive session meeting minutes. It also provides guidance by addressing the meaning of "timely manner" for the approval of minutes. The Open Meeting Law requires public bodies to approve meeting minutes in a timely manner. Public bodies that approve meeting minutes within the next three regular meetings will have approved minutes in a timely manner. While this timeline would not be a rigid requirement, as a public body may show good cause for further delay, it should help encourage public bodies to develop a schedule for prompt creation and approval of meeting minutes.